cient to say that the averment in the indictment is that the express company was engaged in the business of a common carrier of packages, etc., and that the shipment and delivery were made and done in the usual course of its business. This excludes necessarily the assumption that the transaction was one of sale by the express company at East Bernstadt, and of course the company was under no obligation to offer testimony in support of that which the State admitted to be the fact.

We do not mean to intimate that an express company may not also be engaged in selling liquor in a State contrary to its laws, or that the fact that the consignee did not order a shipment might not be evidence for a jury to consider upon the question whether the company was not, in addition to its express business, also selling liquor contrary to the statutes. It is enough to hold, as we do, that under the averments of this indictment such testimony is immaterial. It is, of course, a question of fact whether a carrier is confining itself strictly to its business as a carrier, or participating in illegal sales. The consignor alone may be trying to evade the statute. He may forward the liquors in the expectation that the consignee will, when informed of their arrival, take and pay for them. So the fact that there is no previous order by the consignee may not be conclusive of the carrier's wrongdoing, but still it is entitled to consideration in determining that question.

Much as we may sympathize with the efforts to put a stop to the sale of intoxicating liquors in defiance of the policy of a State we are not at liberty to recognize any rule which will nullify or tend to weaken the power vested by the Constitution in Congress over interstate commerce.

The judgment of the Court of Appeals of Kentucky is reversed and the case remanded for further proceedings not inconsistent with this opinion.

No. 332.

Adams Express Company, Plaintiff in Error, vs. The Commonwealth of Kentucky. } In error to the Court of Appeals of the State of Kentucky.

[May 13, 1907.]

Mr. Justice BREWER delivered the opinion of the Court.

This case differs from the preceding in the fact that it was tried by the court without a jury. In all other respects it is substantially the same.

There was the same averment in the indictment; and more than that, there was an express stipulation made between counsel pending the trial in these words:

"It is further agreed at this point that the whiskey about which the witness testified was delivered by the Adams Express Company and received by it in its office in Cincinnati in the usual course of business as a common carrier, and carried by it to Barbourville, Kentucky, by the method commonly known as C. O. D."

There is nothing, therefore, to distinguish this case in principle from the preceding, and the same judgment will be entered in this as in that.

No. 583.

American Express Company of New York, Plaintiff in Error, vs. The Commonwealth of Kentucky. } In error to the Court of Appeals of the State of Kentucky.

[May 13, 1907.]

Mr. Justice BREWER delivered the opinion of the Court.

This case, like the two preceding, was a prosecution of the express company for a violation of the Kentucky statute in respect to "C. O. D." shipments. It was tried in the Circuit Court before a jury, which returned a verdict of guilty and fixed the penalty at one hundred dollars fine, which verdict was sustained and judgment entered thereon by the Circuit Court. The company appealed to the Court of Appeals, which affirmed the judgment, 97 S. W. Rep. 807, 30 Ky. Law Reporter, 207, and thereupon the case was brought here on writ of error.

The consignee testified that he did not give an order for the shipment, while there was testimony on behalf of the consignor that such an order was filed with it in the name of the consignee and the shipment made upon that order. The brief of the Attorney General in the Court of Appeals, after referring to the testimony of a witness on behalf of the company, said:

"It will appear from his evidence that he resides in Cincinnati, Ohio, and is manager for a wholesale liquor firm located in said city; that on March 21st, 1905, he received an order filed as an Exhibit 'X' from Richard Graham of Hodgensville, Ky. for an order of whiskey to be sent C. O. D., for the delivery of which the warrant herein was issued against the appellant company; that upon this order the whiskey in question was